BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I. Opinions Below

The opinion of the District Court appears on pages 113 to 120 of the record. The opinion of the United States Circuit Court of Appeals is reported in 145 F. (2) 684. The petition for rehearing appears on page 137 of the record.

II. Statement of the Grounds on Which Jurisdiction Is Invoked

Petitioner seeks a writ of certiorari under Section 240 (a) of the Judicial Code, as amended, Title 28, U. S. C. A. 347(a), to review final judgment of the United States Circuit Court of Appeals for the Fifth Circuit. The grounds or reasons which Petitioner contends should impel this Court to review the judgment are set out in the petition on pages 7 to 8. To be concise, we refrain from repeating them.

III. Statement of the Case

The case has been stated in the petition, and for brevity's sake will not be repeated here.

IV. Questions Involved

(a) In a case arising in Florida where a party to a contract agrees to pay a stipulated sum of money as liquidated damages for non-performance of a contract and subsequent to the execution of a contract a third party enjoined one of the parties from going forward with the contract, there being no decision by the Florida Court on the question, should not the Federal Court have followed the decision of the Supreme Court of the United States, and in particular one arising from Florida holding that impossibility of performance arising subsequent to the execution of the contract would not relieve one of the parties from responding to damages for defaulting on its undertaking?

(b) In a case arising in the Federal Court in Florida where a party agrees to pay a stipulated sum of money as liquidated damages for non-performance to a contract, and subsequent to the execution of the contract a third party enjoins o 'e of the parties from going forward with the contract, there being no decision by the Supreme Court of Florida on the question, should not the Federal Court have followed the common law rule which is in force and effect in Florida holding that impossibility of performance of a contract subsequent to its execution is not such a *vis major* as will relieve either of the contracting parties from paying damages for non-performance?

(c) In a case arising in Florida in the Federal Court, there being no Florida decision on the point, should not the Federal Court have followed the decisions of other Circuit Courts of Appeal holding that an injunction sued out by a third party subsequent to the execution of a contract is not such a *vis major* as will relieve the party from its contract of paying damages for non-performance?

(d) A contract was entered into in Florida to refund the indebtedness of a County. This contract provided that the new issue of bonds would be offered for sale and the money used to replace a callable issue. An injunction is sued out by a third party restraining the County from going forward, this injunction is released three months prior to the expiration of the contract, but after the time in which the callable bonds could have been called for redemption during the life of the contract. Did the Federal Court err in determining the Florida law that the new bonds could not be sold and delivered because the old bonds had to be called and redeemed simultaneously with the sale of the new bonds, and that such old bonds could be called for redemption in the interim between the date of the lifting of the injunction and the expiration date of the contract.

ARGUMENT

(A)

The decision of the District Court is in conflict with decisions of this Court

A clear cut question of law is present. Nuveens contracted to refund the County's indebtedness. They guaranteed this performance by a $10,000 certified check, by which they contracted to pay liquidated damages if they failed to perform. After the execution of the contract a third party enjoined the County from going forward with the contract during the pendency of an appeal. Is such an injunction sued out by such a third party such a *vis major* as will excuse one of the parties from his contract of paying damages for failure to perform?

This Court, in the case of *Jacksonville Mayport, etc. Railway* v. *Hooper*, 160 U. S. 514 40 L. Ed. 515 (a Florida case), held that impossibility of performance arising subsequent to the execution of a contract was not such a *vis major* as would relieve the parties. That decision is in line with many other decisions of this Court such as *Chicago, Milwaukee & St. Paul Railway* v. *Hoyt*, 149 U. S. 1, 37 L. Ed. 625; *The Harriman*, 9 Wall. 161, 172, 173, 19 L. Ed. 629; *Jones* v. *United States*, 96 U. S. 24, 29, 24 L. Ed. 644; *Northern Pacific Railway Co.* v. *American Trading Co.*, 195 U. S. 439, 466, 467, 49 L. Ed. 269.

In the case at hand Nuveens placed no provision in the contract of indemnity guarding against the contingency which arose. They unqualifiedly promised to pay $10,000 damages for failure to perform. Clearly the District Court erred in failing to follow the United States Supreme Court decisions on the point.

(B)

The decision of the District Court is in conflict with the Common Law Rule (the Common Law Rule being in force in Florida).

The old common law rule, as announced in the case of *Parradine* v. *Jane*, Allyn 26, is that where a party contracts to do a certain thing he is firmly held to his promise, and any matter arising subsequent to the execution of that contract will not relieve him from that obligation. This common law rule is the law of Florida. Chapter 2.01 Florida Statutes, 1941. Therefore, the District Court should have followed this common law rule.

The only Florida case that might even be helpful is the case of *Moon vs. Wilson*, 100 Fla. 791, 130 So. 25, and even there the facts are not the same. In that case Moon brought an action to foreclose a statutory lien for labor and materials furnished in the construction of a house upon the defendant's property. Before the house could be completed, it was partially destroyed by the hurricane of 1926. The owner of the house defended on the ground that the subject matter had been destroyed, and therefore it should not be held bound. The question was who should bear the loss by the partial destruction of the building in process of erection. The District Court held that the loss should fall upon the contractor, and the Supreme Court of Florida affirmed. The Supreme Court pointed out the general rule:

> "It is a well settled rule of law that if one contracts absolutely and unqualifiedly to do something possible to be done, he must make his promise good unless his performance be rendered actually impossible by the act of God, the law, or the other party. If unexpected impediments lie in the way of the performance of the contract and a loss must result, it leaves the loss where

> the agreement of the parties has put it. The parties must themselves guard against unexpected contingencies by express exceptions in their contracts. If they have made no provision for a dispensation, the law gives none; it will not insert, for the benefit of one or the other of the parties, by construction, an exception which they failed, either by design or neglect, to insert in their agreement. A contract fairly made will not be annulled by an interpolation of something which the parties themselves have not stipulated."

Of course, in that case there was no specific contract to pay damages for failure to perform, but the principle is the same.

In the instant case, Nuveens promised to pay $10,000 if he failed to perform. He did not perform. Consequently it is submitted that the common law rule should apply, and he should not be relieved from his obligation by an injunction sued out by a third party.

(C)

The decision of the District Court is contrary to the decisions of other Circuit Courts of Appeal

The District Court, affirmed by the Circuit Court of Appeals, determined by the decision of *Moller vs. Herring*, (Fifth Circuit) 225 Fed. 670, that the contract became impossible of performance by operation of law. However, in the case of Moller vs. Herring, an executory contract was entered into for the sale of certain bales of cotton. Before the cotton could be delivered one of the parties, a receiver was appointed to take charge of all of the stranded cotton, and all parties were enjoined from interfering with him. In that case, the very essence of the contract was taken into the breast of the Court. That is entirely different from an injunction sued out by a third party litigant personally against one of the parties. That decision is in line with

every decision that will be cited to this court by respondent in opposition in support of their opposition. The Circuit Court of Appeals for the Sixth Circuit, in the case of *South Memphis Land Co. vs. McLean Hardware Co.*, 179 Fed. 417, (C. C. A. 6) (1910) determined that an injunction sued out by a third party would not relieve performance. It is submitted that the correct law on the subject is as stated in the case of *Klauber vs. Car Company*, 95 Cal. 353, 30 Pac. 555, where the Court pointed out that an interference of a writ sued out by a third party will not

> "* * * excuse performance of a contract, although it may deprive the contractor of a means of performance, *it is not prevented by operation of law, it is the act of an individual and not of the government.*"

Likewise, the case of *Kansas Union Life Insurance Co. vs. Burman*, 141 Fed. 848 (where the contract was held to be *ultra vires* so that every basis on which the action was brought was void), the Court in that case pointed out that where an injunction was secured by a private litigant, such an injunction will not excuse a breach of the contract. All of the text writers point to the fact that there is some confusion on the point, and therefore the question, in view of the conflict of decisions by the various Circuit Courts of Appeal, should be resolved by this Court clarifying the point.

(D)

The District Court, in Determining as a matter of Florida law that the new issue of bonds could not be sold and delivered between June, 1942 and August, 1942, because the callable bonds which they were to replace could not be called and redeemed at the time of such sale, failed to follow the decisions of Florida on the point.

Not only did the District Court fail to follow the Florida decisions on the point, but it failed to even construe the

contract as to such contention. The contract was specific and clear. It specifically provided that at the time of sale if the successful bidder desired to accelerate the delivery of the new bonds to a date prior to the next call date, the County would make delivery as requested, but the purchaser would have to pay the interest on the callable bonds from the date of the delivery of the new bonds until the next call date for the old bonds. The contract can have no other meaning. It reads as follows:

> "In the event that the successful bidder at said sale shall request the Board to accelerate delivery of said new Refunding Bonds to a date prior to the date of call, the Board will make delivery as requested, provided, however, that the successful bidder shall reimburse your Board for any interest to be paid on presently outstanding bonds between the date of delivery of the new Refunding Bonds and the date of call."

The District Court, in spite of this provision in the contract, determined as a matter of law that this could not be done. In this he was clearly in error. The case of *State vs. Miami*, — Fla. —, 19 So. (2) 410, is on all fours on that point. In that case the City of Miami had outstanding an issue of bonds which were subject to call on July 1, 1945. It adopted a resolution on August 16, 1944 to sell a new issue of bonds for the purpose of refunding its callable bonds. The District Court determined that the new bonds could be immediately sold and placed on the market some seven months before the old bonds would be called. The Supreme Court of Florida affirmed, saying:

> "The appeal is from the validating decree and the question is whether or not the City of Miami is authorized to issue and deliver immediately the proposed $7,600,000 new Refunding Bonds 1944, Series GM, to redeem bonds maturing July 1, 1945.
> "The issuing Resolution No. 18569 was adopted pursuant to Chapter 15686, Special Acts of 1931 (First

Extra-ordinary Session) and section Six, Article Nine of the Constitution regulating the issue of refunding bonds. An examination of the issuing resolution and the law as thus stated discloses that the real question for decision is whether or not approximately seven months may transpire from the time that new Refunding Bonds are issued to the maturity date of the bonds to be refunded.

"We considered a like question in City of Miami v. State, 139 Fla. 598, 190 So. 774; Fleeman v. City of Jacksonville, 140 Fla. 478, 191 So. 840; and State v. City of Miami, 142 Fla. 284, 194 So. 792. In these cases, we held that an appreciable length of time might run from the issue of the refunding bonds to the maturity of the bonds refunded. In all these case-, we were treating with periods shorter than seven months, the period involved here, but we have not limited the time to any arbitrary period."

Consequently, the County, as a matter of law, could have sold the new bonds during the interim from June to August, and the old bonds could have been called on their next interest payment date. It was of no concern to Nuveens as to whether or not the County would receive a legal bid on the bonds because its war clause would only come into operation after the bonds were offered for sale. They could not determine arbitrarily that the County would receive no bid on the bonds and then refuse to get the bonds ready for sale so no person could bid upon the same.

Conclusion

This Court should certainly exercise its supervisory power in order to clarify the many conflicting decisions of the various Circuit Courts of Appeal on impossibility of performance of a contract arising subsequent to its execution, and should clearly clarify the law and point out the distinction between impossibility arising by injunction sued out by a private litigant (which the Petitioner here con-

tends is no *vis major* whatsoever), and impossibility arising by virtue of a receivership, where the very essence of the contract is taken into the breast of the Court. Furthermore, the District Court should have followed the decisions of this Court, and in particular the decision that came up from Florida holding that impossibility of performance subsequent to the execution of the contract will not excuse one of the parties from its agreement; and furthermore, it would appear the District Court would be duty bound under the Erie Railroad case to follow the decisions as announced by the Supreme Court of Florida, which held that the new issue of bonds could be sold as a matter of law prior to the time that the old bonds were redeemable.

WHEREFORE, Petitioner respectfully submits that the writ of certiorari should be granted and this Honorable Court should review the decision of the Circuit Court of Appeals, and finally reverse it.

Respectfully submitted,

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